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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

14 CR 34 (RMB)

6 DINESH D'SOUZA,

7 Defendant.
-----x

8 New York, N.Y.
9 May 15, 2014
10 9:30 a.m.

11 Before:

12 HON. RICHARD M. BERMAN,

13 District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
Southern District of New York

17 CARRIE H. COHEN

18 PAUL KRIEGER

19 Assistant United States Attorney

20 BENJAMIN BRAFMAN, ESQ.

21 ALEX SPIRO, ESQ.

22 Attorneys for Defendant

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1 (In open court)

2 THE COURT: Please be seated.

3 So what I thought for this morning was as follows, and
4 I think the papers that have been submitted here are excellent
5 for one thing from both sides and I have been over them
6 thoroughly. So I have some questions for you, but I don't want
7 to cut you off if there is some point particularly perhaps that
8 you haven't already made or you want to emphasize so I am happy
9 to give you each a couple minutes to say whatever you would
10 like, in addition to what is in your papers if you wish to.
11 Otherwise, we can move right to some questions.

12 MS. COHEN: Your Honor, Carrie Cohen for the
13 government, and with me at counsel table is Assistant United
14 States Attorney Paul Krieger and paralegal specialist Mary
15 Riverso.

16 I think the government feels like its position is
17 fully set forth in the papers and so is happy to answer any
18 questions your Honor might have and respond to defense counsel.

19 MR. BRAFMAN: Good morning, Benjamin Brafman. With me
20 at counsel table is Alex Spiro and Mr. D'Souza is present.

21 Your Honor, we too feel that our papers set forth our
22 position as well as they can be set forth and I took it from
23 the Court's reaction to the latest government filing, on this
24 order -- I concluded from the Court's decision order that no
25 addition filings be submitted, that your Honor had fully

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1 understand our respective positions and that the Court didn't
2 need any further effort by us. So I assume we will stand on
3 our submissions unless the Court has specific questions. Thank
4 you, your Honor.

5 THE COURT: I do have if some questions for about each
6 side. About the filings, they are always, in my experience
7 anyway, we get to a point where there is a trial scheduled and
8 all of a sudden exponentially the filings start flying left
9 and right so to speak. I am not suggesting that is what is
10 happening here. Normally I put out an order at an earlier
11 point than perhaps I did here saying sort of speak we have
12 enough. That is also true during the trial. If anybody wants
13 to make a submission, we should talk about it orally at side
14 bar first.

15 So here are a couple questions that I have, and I have
16 some for the government and some for the defense so why don't I
17 do one each. First for you, Mr. Brafman, so if I understand
18 your papers, and I think I do, you are contending that
19 Mr. D'Souza acted out of you call it pure but misguided
20 friendship in asking the parties, that is to say somebody who
21 worked for him and someone with whom he had a relationship, to
22 make these per couple two 10,000-dollar contributions and he
23 indicated that he had would reimburse them?

24 MR. BRAFMAN: That's correct, your Honor.

25 THE COURT: That is conceded. But at the same time

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1 you argue in your papers that the case against him should be
2 dismissed because what Mr. D'Souza did was not illegal for
3 various reasons -- case law, statute, etc. So the question is
4 though: If the case should be dismissed, how and why was his
5 behavior misguided?

6 MR. BRAFMAN: Well, I think at the end of the day even
7 if you don't intend to violate the law, which we submit
8 Mr. D'Souza did not, to the extent that there is a campaign
9 rule that perhaps was violated, then I think the statement that
10 this was an act of misguided friendship I still think holds
11 true. Our position is the criminal charges should be
12 dismissed. If the FEC feels that a fine or civil action is
13 appropriate and the issue is whether this was misguided
14 friendship that leads him to be civilly liable, we would deal
15 with that obviously in a different forum. Our motion to
16 dismiss relates solely to the criminal charges.

17 THE COURT: So you are saying that the criminal case
18 could and should be dropped even though something he did was
19 misguided in terms of asking two sets, two couples as it were,
20 to make these contributions?

21 MR. BRAFMAN: Yes, your Honor.

22 THE COURT: So the question for the government: There
23 was an original -- I will call it original -- contribution by
24 Mr. D'Souza and his wife in I believe February of 2012 in the
25 total amount of \$10,000 to the Long campaign and so the

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1 question for you is was that contribution legal and/or was
2 Mrs. D'Souza, Dixie D'Souza, a straw donor?

3 MR. KRIEGER: Your Honor, we moved under Rule 404(b)
4 to admit that conduct. At this point we don't intend to call
5 Ms. D'Souza to testify about that contribution; but to your
6 point, if Ms. D'Souza did not in fact authorize that
7 contribution, did not consent to that contribution being made,
8 at least her 5,000-dollar portion, yes, it is not a permissible
9 contribution. It is as much as a straw donation as the other
10 donations.

11 MR. BRAFMAN: Your Honor, can I address that for the
12 record so the record is just complete?

13 THE COURT: Yes.

14 MR. BRAFMAN: I don't agree at all. There are many
15 couples where one spouse or the other assumes sort of the
16 financial responsibility for signing tax returns, preparing
17 them, banking obligations. In this case Ms. D'Souza, his wife
18 dixie were here to testify, I think in words or substance she
19 would say while she didn't know that it was being made on her
20 behalf at the time, she certainly implicitly authorized him
21 over the course of their marriage to handle all of the couple's
22 financial affairs. To the extent that he signed the document,
23 which he believes to be truthful, and the amount in question
24 doesn't exceed the statutory amount, I don't believe that is
25 evidence of any criminal conduct and if that were the only

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1 thing we were dealing with, I doubt that we would be here.

2 THE COURT: Part of my next question to you, which is
3 this: Going back to that 2012 Mr. D'Souza could only
4 contribute 5,000 to Ms. Long and so I guess it was crucial that
5 that 10,000-dollar contribution come from, be allocated evenly
6 to Mr. D'Souza and his wife; fair enough?

7 MR. BRAFMAN: That's correct.

8 THE COURT: Otherwise it would be illegal. Then you
9 do say in your papers as you have just said now that it is not
10 uncommon for one spouse to control the checkbook in a two-party
11 household so to speak. Here is my question, and it is less of
12 a legal one I suppose than a practical one: There are many
13 households where the husband is a Democrat and the wife is a
14 Republican or vice versa, and there are I suppose many
15 households where someone might have contributed to Senator
16 Gillibrand and someone to Ms. Long so how do we know that it is
17 it okay for one spouse to sign the 10,000-dollar check? How do
18 you know that Mrs. D'Souza, for example, didn't prefer
19 Ms. Gillibrand to Ms. Long?

20 MR. BRAFMAN: Your Honor, the government has made a
21 wise decision in not choosing to call the ex Mrs. D'Souza,
22 Dixie as she is referred to. But had she been called as a
23 witness, I think we would be able to verify beyond question
24 that she shared much, if not all, of the husband's political
25 beliefs, and that she knew Wendy Long, that she knew the

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1 defendant knew Wendy Long and to the extent that he had raised
2 the subject, I doubt very much that there would be evidence
3 that she would have opposed it. If she opposed it, it would
4 have been for personal reasons not for political reasons.
5 Again, I think he had a good-faith basis to believe that on a
6 politics issue he was supporting a candidate that was more in
7 line with the married couple's collective political views.

8 THE COURT: Thank you.

9 For the government with respect to 441(f) and the
10 McCutcheon decision, is there a severability or saving clause
11 that applies? That is to say is it a matter of case law that
12 one aspect of a statute is declared unconstitutional and the
13 other aspects remain in full force and effect, or is that your
14 position that applies here with respect to aggregate versus
15 base limits?

16 MS. COHEN: I mean, your Honor, in general that is a
17 proposition.

18 THE COURT: Is that a matter of statute or case law or
19 both?

20 MS. COHEN: I think, your Honor, it is a matter of
21 statutory interpretation and common law. I think here the
22 statutes at issue cover a broad range of campaign finance laws
23 and the aggregate limits versus the individual limits are very
24 different from 441(f), which strictly prohibits making straw
25 donations, making donations in other people's name. 441(f)

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1 does not deal with the dollar amount of the limit, whether it
2 is an individual versus an aggregate limit. It is a strict
3 prohibition on any donation in anyone else's name. I just
4 don't think it is at all related to McCutcheon.

5 THE COURT: My two followups: Is a straw donation in
6 the amount of \$5,000 legal?

7 MS. COHEN: No. A straw donation in the amount of
8 anything is not legal.

9 THE COURT: What is the penalty for a 5,000-dollar
10 straw donation?

11 MS. COHEN: It depends how the penalty provision of
12 441(f) delineates between is the donation \$200, 10,000 and
13 above, 20,000 and above, and it is prescribed different
14 penalties. Some make it criminal and some do not make it
15 criminal.

16 THE COURT: If someone makes a 5,000-dollar straw
17 donation, what penalty do they face?

18 MS. COHEN: Your Honor, to be criminal it has to be
19 more than 2,000.

20 THE COURT: So 5,000 is more than two.

21 MS. COHEN: I believe it is a misdemeanor, your Honor,
22 when it is between two and 10. Between two and right under 10,
23 9,999. I think 10 and above becomes a felony punishable by two
24 years.

25 THE COURT: Ms. Cohen, Mr. Brafman says somewhere in

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1 his papers as I recall, maybe page 21 of the affidavit, that
2 there was some discussion between him and you about certain FBI
3 documents and I am not sure what that is about and whether
4 these are documents that you plan to turn over to him?

5 MS. COHEN: Sure. Your Honor, if I could correct one
6 thing. It is more than 10,000 that makes it a felony.

7 So with respect to whatever documents related to the
8 underlying investigation, they are not documents that we would
9 typically turn over in any type of case. We do not turn over
10 sort of all the underlying investigative documents unless of
11 course they are relevant under Rule 16 or they have some
12 *Giglio, Brady*. Here they do not. They are not documents that
13 we typically in any case would turn over. Here, since there is
14 not an adequate showing of selective prosecution, they are not
15 documents that the government is prepared to turn over.

16 THE COURT: Mr. Brafman, the last question I have for
17 you relates to the selective prosecution. We know that here
18 you need to show some evidence of discriminatory effect and
19 discriminatory purpose. I think that is right; right?

20 MR. BRAFMAN: Yes.

21 THE COURT: With respect to discriminatory effect,
22 under the cases, they talk about the different classifications
23 of individuals. What is Mr. D'Souza's classification? And
24 then relatedly who are from your point of view the similarly
25 situated persons of a different classification who were not

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1 prosecuted?

2 MR. BRAFMAN: Well, Judge, that begs the question
3 respectfully.

4 THE COURT: No. That is the question. You may want
5 to answer a different one.

6 MR. BRAFMAN: No. I will answer that question. I
7 want to respectfully point out that we believe that in order
8 for us to make the requisite showing so that the Court can
9 grant the motion to dismiss based on selective prosecution, we
10 need to know what prompted the investigation of Mr. D'Souza and
11 what prompted it in such an expeditious manner that in almost
12 every over case that doesn't have an element of corruption or
13 candidate involvement doesn't get handled this way. So what we
14 have asked, and that is the only thing we have asked -- we have
15 preserved the issue -- but what we ask now is for the Court to
16 order that the government provide us with the FBI report.

17 THE COURT: I understand that. I do understand that.
18 Do you have any notion of what classification he is in and what
19 classification people who are not prosecuted? Is men one class
20 versus women? Is it people of some national origin? People
21 who are billionaires versus people who --

22 MR. BRAFMAN: Judge, if he were targeted because of
23 his political beliefs and if his political beliefs and writings
24 and his antiadministration position was what got him referred
25 for criminal prosecution and we could prove that, then I think

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1 he would have a right to consider this a selective prosecution
2 even if it didn't specifically designate him a man or woman or
3 Republican or conservative. The issue that we have raised and
4 I think we raised as best we can without getting the documents
5 in question --

6 THE COURT: Right.

7 MR. BRAFMAN: -- is I think we have made a showing
8 that this case was handled very differently and that most cases
9 with this amount of a threshold without candidate involvement
10 to quid pro quo get routinely handled by the FEC and as a
11 result of having that memo and suggesting that we cannot see
12 it, we would suggest at this point that if the government were
13 to provide it to the your Honor for in camera review and then
14 the Court would know that there is an issue or no an issue. We
15 would accept your decision on that so that we don't lose the
16 issue entirely because your Honor has made an honest
17 assessment.

18 I don't see any prejudice to the government whatsoever
19 in turning over a memorandum provided by the FBI, which may
20 quite frankly demonstrate that while this audit may have been
21 routine that the decision to submit it to the Southern District
22 for felony prosecution was because of who the defendant was and
23 what he had said not because of what he had done.

24 THE COURT: Okay.

25 MR. BRAFMAN: And when your Honor doesn't have any

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1 other questions, there is the 441(f) question that your Honor
2 raised with the government. Do you want any comment on that,
3 just briefly?

4 THE COURT: You can. Feel free.

5 MR. BRAFMAN: As we suggested respectfully in our
6 memorandum of law on this issue, we believe that absent a
7 congressional fix of the statute post the McCutcheon decision,
8 we believe that it would be unconstitutional to prosecute
9 anyone, and of course Mr. D'Souza, for violating 441(f) because
10 the statute bars "contributions" and doesn't classify which
11 contributions. Since McCutcheon ruled that you cannot punish
12 someone criminally for making an aggregate contribution, there
13 is a notice issue and there is a vagueness issue that we have
14 briefed for the Court as to why 441(f) now is no longer a
15 viable criminal statute.

16 THE COURT: I that McCutcheon left undisturbed the
17 base limits.

18 MR. BRAFMAN: It did.

19 THE COURT: Specifically.

20 MR. BRAFMAN: Yes. It did but I think because the
21 statute now only has the word "contributions" in it and not
22 "base contributions," it is very hard to understand when you
23 are using that statute that this complies with McCutcheon. I
24 think post if McCutcheon the statute were changed to have the
25 word base, b-a-s-e, put in before contributions, I think we're

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1 okay; but since it is not there and since McCutcheon ruled that
2 aggregate contributions cannot be the basis for criminal
3 prosecution, I think they need to fix the statute.

4 THE COURT: So you think that that decision calls for
5 a statutory fix notwithstanding that the Court itself said
6 indeed undisturbed base contributions?

7 MR. BRAFMAN: Yes.

8 THE COURT: You don't think that is adequate?

9 MR. BRAFMAN: No. Because I think when one looks at
10 the issue of notice, fair notice, and due process I think the
11 statute needs to give the notice, not a Supreme Court decision
12 that may or may not have been read by most of the citizenry. I
13 think having it in the decision now makes it absolutely clear
14 that as constructed it is not adequate.

15 Thank you.

16 MS. COHEN: If I could be heard briefly about the idea
17 that there is no prejudice to government for your Honor to
18 review the FBI memorandum in camera.

19 THE COURT: You going back to a different point that
20 Mr. Brafman made that you had some memorandum that he would
21 like to see in order for him to determine whether there was a
22 selective prosecution here or not?

23 MS. COHEN: Specifically to his request that at this
24 point what he is seeking is just an in camera review of those
25 documents.

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1 THE COURT: Right. In the first instance he is asking
2 you to give it to him and in the second, I guess, he is saying
3 I should look at it and make a determination whether we should
4 take it to the next step.

5 MS. COHEN: Just to address that second point.

6 THE COURT: Fair enough.

7 MS. COHEN: Here you have to meet the adequate showing
8 in order to review it. It is prejudiced to the government in
9 general in that in every case you need to make the showing
10 before the judge reviews it in camera otherwise in every case
11 the government would be required to turn over all sorts of
12 underlying investigative memos for the judge to review in
13 camera just because perhaps it might be easier. The law is
14 clear here the defendant has a certain showing. It is a high
15 burden on the defendant, especially in selective prosecution
16 because the --

17 THE COURT: You are saying there is no showing of some
18 evidence as the law requires in order to go further on this
19 whole issue of selective prosecution?

20 MS. COHEN: Correct, your Honor.

21 THE COURT: You get the last word.

22 MR. BRAFMAN: Thank you, Judge.

23 Most respectfully, Judge, to suggest that you
24 shouldn't look at the document in this case because that will
25 open the floodgates to every other case, I defy them to show me

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1 a case that has so many unique facts that point to the
2 indictment of the defendant perhaps for unlawful reasons. To
3 the extent that there is a memo which they can concede and it
4 is in their possession, I don't see any prejudice in handing it
5 up for the Court to look at. It will take a couple minutes of
6 your Honor's time and then we can know what we are talking
7 about. To suggest it opens it up to every other case, I have
8 done this for 37 years and I have never seen facts this
9 interesting to raise the issue. So why not give it to the
10 Court? How are they prejudiced in this case? That is a
11 precedent for other cases.

12 THE COURT: This is very helpful. This Q and A has
13 been helpful as well. I hope this is not too much of an
14 imposition on you, but I expect to have a ruling today at 3:00.
15 I will see you then and I will rule from the bench at that
16 time.

17 MS. COHEN: Your Honor, because it is our final
18 pretrial conference --

19 THE COURT: Yes. There will be more conference at
20 3:00.

21 MS. COHEN: So you would like us all back here at
22 3:00?

23 THE COURT: Yes.

24 MS. COHEN: At that time just to preview, would your
25 Honor be willing --

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1 THE COURT: I will be ruling on these various motions
2 and then depending on the outcome of those rulings, there will
3 be next steps or no next steps and we'll take them if there are
4 any.

5 MS. COHEN: Thank you, your Honor.

6 THE COURT: One point of clarification. So you
7 mentioned that Dixie -- I am refer to Mrs. D'Souza. I am not
8 sure if that is accurate -- is not going to be a witness in
9 this case?

10 MS. COHEN: The government does not expect on its
11 direct case. Depending on the defense case I suppose there
12 might be some issue for rebuttal, but the government will bring
13 it to your Honor's attention and seek a 404(b) type ruling in
14 advance.

15 THE COURT: See you at 3:00. Thank you.

16 (Recess)

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1 THE COURT: Please be seated. So the outstanding
2 motions are resolved as follows -- this will take a little
3 while, probably 15, 20 minutes. At the outset, let me make
4 this point very clearly, that in ruling on these various
5 motions, what I say in these rulings is limited to the motions
6 themselves, including the motion to or branches of motions to
7 dismiss the indictment, and what I'm saying bears no impact
8 upon the question of Mr. D'Souza's guilt in this case. The
9 defendant is presumed, of course, to be innocent now and until
10 such time, if it comes, that a jury determines that he is
11 guilty beyond a reasonable doubt, and nothing that I say
12 changes that. That's a fundamental principle of our legal
13 system.

14 So I've reviewed all of the submissions, which have
15 been very thorough and excellently done. They include the
16 defense motion dated April 17, the government opposition dated
17 April 24, the defense reply dated May 2, the government's
18 motion in limine dated April 17, the defense response to that,
19 dated April 23, defense letter dated April 29, the government
20 letters dated May 8 and May 12 and also, as you're aware,
21 having conducted some relatively brief questions and answers
22 during oral argument this morning, these are my determinations.

23 First, by way of a little bit of background.
24 Mr. D'Souza is charged in a two-count indictment that alleges
25 the following: Count One says that in or about August 2012, in

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1 the Southern District of New York and elsewhere, he willfully
2 and knowingly made and caused to be made contributions of money
3 aggregating more than \$10,000 during the 2012 calendar year in
4 the names of others, and these considerations were made to the
5 campaign of Wendy Long, who was running in New York for United
6 States Senator.

7 Mr. D'Souza is alleged to have reimbursed others with
8 whom he was associated, and who he had directed to contribute a
9 total of \$20,000 to Ms. Long's campaign.

10 In February, 2012 Mr. D'Souza distributed \$10,000 for
11 himself and his wife, Dixie, also to that Wendy Long campaign.
12 Several months later, that is to say after his
13 \$10,000 contribution, and in order to further support Long,
14 whom he knew from their days as students at Dartmouth, D'Souza,
15 according to the defense, in an act of pure but misguided
16 friendship, asked two individuals and their spouses to donate
17 \$10,000 to Ms. Long's campaign, with the understanding that
18 Mr. D'Souza would fully reimburse them.

19 The first arranged contribution was made on or about
20 August 18, 2012, which involved Denise Joseph and her husband
21 Dr. Louis Joseph. The second contribution was also made on or
22 about August 18, 2012, and it involved Mr. D'Souza's then
23 personal assistant at Kings College, an individual named Tyler
24 Vawser and his wife, Mr. Vawser's wife, that is. And these two
25 couples were reimbursed for these contributions either the same

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1 day or the following day.

2 It is contended by the government that the defendant
3 instructed straw donor Vawser, who allegedly -- that is to say
4 alleged by the government -- feared that the defendant was
5 asking him to do something illegal or wrong, to lie to anyone
6 who asked about the donation by claiming that he, Mr. Vawser,
7 knew Ms. Long and supported her candidacy. It is further
8 alleged by the government that Mr. D'Souza lied to the
9 candidate herself, Miss Long, to mask his actions.

10 Count Two of the indictment says that from in or about
11 August 2012 through July 2013, in the Southern District and
12 elsewhere, Mr. D'Souza willfully and knowingly caused the
13 submission of materially false, fictitious, fraudulent
14 statements, representations to wit, that he caused the
15 submission by an unwitting, authorized campaign committee of a
16 candidate for the United States Senate -- that's Ms. Long's
17 campaign -- to the Federal Election Commission of reports that
18 falsely reported the sources and amounts of contributions of
19 the campaign by certain individuals.

20 I'm not going to go into the arguments of each side.
21 They're in the submissions and in the papers. Sometimes I may
22 mention an allegation by one side or the other, but for the
23 most part, it would not do those arguments justice to repeat
24 some of them here and not all. They're quite extensive and
25 comprehensive.

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1 But the first issue, so to speak, concerns the
2 constitutionality of a statute called 2 United States Code
3 Section 441F, that is the Federal Election Campaign Act, and it
4 provides, among other things: That no person shall make a
5 contribution in the name of another person. So that is what is
6 alleged here that Mr. D'Souza has done. It also provides: Or
7 knowingly permit his name to be used to effect such a
8 contribution and no person shall knowingly accept the
9 contribution made by one person in the name of another.

10 Section 441F -- this is a quote from *U.S. v*
11 *O'Donnell* -- "prohibits straw donor contributions in which the
12 defendant solicits others to donate to a candidate for federal
13 office in their own names and furnishes the money for the gift
14 either through an advance or pre-arranged reimbursement." The
15 cite is *U.S. v. O'Donnell* 608 F.3d 546, a Ninth Circuit case
16 from 2010.

17 And the defense submission acknowledges that the
18 statute we're talking about has been construed to prohibit
19 straw donor contributions in which a defendant solicits others
20 to donate to a candidate for federal office in their own names
21 and furnishes the money for the gift either through an advance
22 or pre-arranged reimbursement. That is a conclusion that the
23 defense does not challenge.

24 This morning you heard and, of course, there's been
25 extensive coverage of the Supreme Court decision on April 2,

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1 2014, in the case of *McCutcheon v. The Federal Election*
2 *Commission.* The cite is 134 Supreme Court 1434. In that
3 case -- and this doesn't do the case justice, it's a condensed,
4 very abbreviated summary for our purposes only, that is to say
5 the issues we're looking at -- the Supreme Court stated: The
6 right to participate in democracy through political
7 contributions is protected by the First Amendment, but that
8 right is not absolute. Our cases have held that Congress may
9 regulate campaign contributions to protect against corruption
10 or the appearance of corruption.

11 The Supreme Court in *McCutcheon* invalidated so-called
12 aggregate contribution limits, but it did not aggregate what
13 are called base limits. And we, in this case, are dealing with
14 base limits. The Supreme Court itself, in *McCutcheon*, said
15 that this case does not involve any challenge to the base
16 limits, which we have previously upheld as serving the
17 permissible objective of combating corruption. That's found at
18 *McCutcheon* at Page 1442.

19 Further, it is an element -- this not *McCutcheon*, this
20 is *Brockett v. J-R Distributors* -- where the Court held as
21 follows, or determined, that it is an elementary principle that
22 the same statute may be, in part, constitutional and, in part,
23 unconstitutional and that if the parts are wholly independent
24 of each other, that which is constitutional may stand while
25 that which is unconstitutional will be rejected. That's

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1 *Brockett v. J-R Distributors*, 472 U.S. 491 Supreme Court
2 decision from 1985.

3 So the determination here, of this Court, is that
4 where, as in our case, the defendant is alleged to have engaged
5 in so-called conduit contributions or straw donor contributions
6 and/or where base limits, as opposed to the aggregate limits,
7 are involved, the statute is constitutional and *McCutcheon* does
8 not change that.

9 Now, moving on to the section 437g claim, that
10 437g(d)(1)(D) provides, among other things, that any person who
11 knowingly and willfully commits a violation of section 441f of
12 this title -- that was the section we had been discussing
13 immediately before this -- involving an amount aggregating more
14 than \$10,000 or less than \$25,000 during the calendar year
15 shall be in prison for not more than two years. So that
16 provision makes that behavior a felony, and that is the section
17 that is implicated in this case.

18 In the Court's view, that is to say my view,
19 437g(d)(1)(D) is not unconstitutionally vague. It sets forth
20 penalties to be imposed if one is found to have knowingly and
21 willfully committed a violation of 441f and if, as here, the
22 amount aggregated amount was more than \$10,000 but less than
23 \$25,000 during a calendar year. And as we've said before, the
24 amount in this case is alleged to be \$20,000; that is to say,
25 the two \$10,000 contributions that are said to be straw donor

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1 contributions.

2 So if the defendant is found to have contributed
3 between more than ten and less than \$25,000 -- in this
4 instance, \$20,000, through the four aggregated straw donors
5 during the 2012 calendar year -- he will be subject to
6 punishment set forth in 437g(d)(1)(D).

7 This is a quote from *United States v. Abdi*: To
8 satisfy due process, the criminal statute must be sufficiently
9 clear to give a person of ordinary intelligence a reasonable
10 opportunity to know what is prohibited. And I believe that
11 standard is met here. The cite is *U.S. v. Abdi*, Westlaw cite
12 is 2007 Westlaw 2153-23-4. It's a Ohio District Court case
13 from July of 2007. To satisfy this requirement, the
14 legislature need not define an offense with mathematical
15 certainty but need only provide relatively clear guidelines as
16 to the prohibited conduct.

17 So the upshot of what I've said so far is that the
18 defense motion to dismiss Count One of the indictment is
19 respectfully denied.

20 Turning to Count Two, Count Two alleges a violation of
21 statute called 18 United States Code Section 1001(a)(2) and
22 that section provides that whoever, in any matter within the
23 jurisdiction of the executive branch of the United States,
24 knowingly and willfully makes any materially false, fraudulent
25 or fictitious representation is guilty of a crime. Here, in

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1 this case, the government is alleging that Mr. D'Souza caused
2 materially false information to be provided on campaign finance
3 forms that were filed with the Federal Election Commission.
4 The Federal Election Commission has indicated, specifically
5 states, that no person shall make a contribution in the name of
6 another person.

7 I point out that attached to the defense affidavit,
8 Mr. Brafman's affidavit, are the forms alleged at issue and, as
9 background, I advise you of the following. These forms state,
10 among other things, that the signing parties state that they
11 authorize their contributions to the Wendy Long for New York
12 Committee to be attributed as follows. There are two relevant
13 forms.

14 One says they should be attributed to Louis T.
15 Joseph II, \$5,000, and Denise D. Odie Joseph, \$5,000, and that
16 they authorize their contributions to the Wendy Long for
17 New York Committee to be attributed as follows. This is the
18 other \$10,000 contribution. Tyler G. Vawser, \$5,000, and
19 Alyssa D.Vawser, \$5,000.

20 These forms, incidentally, also state that it is
21 illegal for any person to reimburse another for making a
22 contribution to a political campaign. It appears, from these
23 forms supplied to the Wendy Long campaign -- it appears that
24 these forms supplied to Wendy Long campaign or the information
25 contained in the FEC forms, which, in turn, appear to have been

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1 prepared by the treasurer of the Wendy Long for New York
2 Committee, a man named Cabell Hobbs, in that form, the latter
3 form, Hobbs certifies that he has examined the report and to
4 the best of his knowledge and belief, it is true, correct and
5 complete.

6 And there's a further certification on the form which
7 bears Cabell Hobbs' signature, which states: Submission of
8 false, erroneous or incomplete information may subject the
9 person signing this report to the penalties of 2 United States
10 Code Section 437g.

11 It's clear to this Court that the responses and/or the
12 information in the forms submitted by the Josephs and the
13 Vawsers were not true and are not true. They are not the
14 actual, real contributors. The defendant, Mr. D'Souza is
15 alleged to have been. The forms quite clearly notify donors
16 and potential donors that it is illegal to reimburse another
17 for contributions and that the submission of false, erroneous
18 or incomplete forms would subject one to criminal penalties.

19 The text -- this is a quote from *United States v.*
20 O'Donnell: "The text, purpose and structure of section 441f
21 all support the conclusion that the statute applies not only to
22 false name, but also to straw donor contributions. 441f
23 unambiguously applies to a defendant who solicits others to
24 donate to a candidate for federal office in their own names and
25 either advances the money or promises to and does reimburse

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1 them for gifts." That's *U.S. v. O'Donnell*, 608 F.3d 546, the
2 Ninth Circuit case that I mentioned from 2010.

3 I refer you all also to *United States v. Hopkins* at
4 916 F.2d 2007, a Fifth Circuit case from 1990, where the Court
5 stated the following: "The Hopkins also contend that if false
6 reports were made, they did not make them or cause them to be
7 made. While it may be true that the Hopkins themselves did not
8 make the reports, it is clear that they deliberately caused
9 those reports to contain false information. The evidence
10 showed that by keeping him unaware of their scheme, the Hopkins
11 caused another individual, the treasurer of their political
12 action committee, to report to the Federal Election Commission
13 that the contributions to the political action committee were
14 from individuals."

15 It is well established that 18 United States Code
16 Section 2(b) was designed to impose criminal liability on one
17 who causes an intermediary to commit a criminal act, even
18 though the intermediary who performed the act has no criminal
19 intent and, hence, is innocent of the substantive crime
20 charged.

21 So consequently, the defense motion, respectfully, to
22 dismiss Count Two of the indictment is also denied.

23 So the next issue to resolve is the defense motion for
24 discovery based upon what is called selective prosecution.
25 This motion is submitted in furtherance of a potential motion

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1 to dismiss based upon selective prosecution. So this is an
2 anticipatory motion. It's not a substantive motion itself and,
3 respectfully, this defense motion is denied.

4 Selective prosecution, substantively, is defined as an
5 independent assertion that the prosecutor has brought the
6 charge for reasons forbidden by the Constitution. That
7 definition is found in *United States v. Armstrong*, 517 U.S.
8 456, 1996 decision.

9 Further, this is a quote, again, about the substantive
10 charge of selective prosecution: "To make out a claim of
11 selective prosecution, a defendant confronts a deliberately
12 rigorous standard. He must provide evidence that the
13 prosecutorial decision or policy in question had both a
14 discriminatory effect and was motivated by a discriminatory
15 purpose. The discriminatory effect prong, in turn, requires a
16 showing that similarly situated individuals of a different
17 classification were not prosecuted.

18 "The defendant seeking to show discriminatory purpose
19 must show that the decisionmaker selected or reaffirmed a
20 particular course of action, at least in part, because of its
21 adverse effects upon an identifiable group."

22 That quote comes from the *United States v. Alameh*, 341
23 F.3d 167. It's a Second Circuit case from 2003. And, again, I
24 underscore that those quotes, while pertinent to our
25 discussion, relate to the substantive charge of selective

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1 prosecution. We're talking about a motion for discovery in
2 anticipation of such an application.

3 Defense counsel acknowledges that the Department of
4 Justice, in its prosecutorial discretion, may commence a felony
5 prosecution for a violation of the FECA even where the FEC --
6 that is to say, the Federal Election Commission -- itself would
7 not believe such a case warrants prosecution.

8 So the defense here asserts -- and, again, this is a,
9 I don't want to say a crude summary, but it is a condensed
10 summary, and you should look at the submissions in their
11 entirety. But, in short, the defense asserts that it has made
12 a credible showing with more than just some evidence -- some
13 evidence is the standard of burden in a motion seeking
14 discovery in anticipation of a substantive motion to dismiss --
15 some evidence that, one, compared with others similarly
16 situated, he, Mr. D'Souza, was selectively treated; and, two,
17 that such selective treatment was more likely than not based on
18 the impermissible consideration of punishing him for exercising
19 his First Amendment right to criticize, as severely as he chose
20 fit, the President, his administration and his policies.

21 The government correctly, in my view, points out that
22 over the last few years the Department of Justice and the
23 United States Attorney's Office for this district and the U.S.
24 Attorney's Office for the Eastern District of New York have
25 prosecuted so-called conduit contribution cases against

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1 democrats and Republicans alike.

2 So some of those cases include the following. One is
3 *U.S. v. Jenny Hou and Oliver Pan*; that's 12 CR 53. That's a
4 Southern District case before Judge Sweet. In that case,
5 defendants are charged with straw donor fraud in connection
6 with Democratic candidate for New York City office, and with
7 Pan allegedly responsible for eight donors, totaling
8 approximately \$8,000 in matching funds. That's one such case.
9 So that is a 2012 case. We know that from the caption.

10 Another case is *U.S. v. Baldeo*, the S1 is 13 CR 125.
11 It's a case before Judge Crotty of this district, which the
12 defendant is charged with conduit contribution fraud or
13 soliciting approximately \$15,000 in straw donations from seven
14 individuals for a Democratic candidate for New York City
15 office.

16 The third case is *United States v. Durand*, an Eastern
17 District case from 2013. The defendant is charged with conduit
18 contribution fraud or soliciting \$14,000 in straw donations
19 from two individuals with whom she was friendly, and one
20 individual to whom she was related, for a Republican candidate
21 for the United States House of Representatives.

22 And another case from the Eastern District before
23 Judge Glasser, a 2014 case, *U.S. v. Chatwal*, 14 CR 143, where
24 the defendant pled guilty for making 188,000 in straw donor
25 campaign contributions to three Democratic candidates for

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1 federal office, including the offices of President, Senator,
2 and Member of the House of Representatives.

3 The government also states in its papers the
4 following, this is a quote: "This investigation" -- meaning
5 the instant case that we're concerned with here -- "began as a
6 public source review by the Federal Bureau of Investigations'
7 New York office of the most recent federal campaign in
8 New York, which was the 2012 Senate race in which Ms. Long ran
9 against Senator Kirsten Gillibrand.

10 "The publicly available Federal Election Commission
11 filings readily revealed red flags about donations made by the
12 defendant" -- that would be Mr. D'Souza -- "and those publicly
13 associated with him that, with minimal followup, established
14 proof of a crime." This is all a quote from the government's
15 submission.

16 And the quote goes on to say: "Indeed, it is
17 absolutely routine, and the defendant does not present evidence
18 to the contrary, that public corruption cases brought by this
19 office are initiated not only following referrals from
20 regulatory agencies, but based upon investigative work of
21 various law enforcement agencies, in particular the FBI, as
22 well as the office's own criminal investigators."

23 The Court concludes that the defense, respectfully,
24 has presented no evidence that he was selectively prosecuted.
25 The burden, at this motion stage, is some evidence. I

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1 determine that there is no evidence. There is no evidence of
2 discriminatory effect nor of discriminatory purpose. The
3 defendant is, for example, unable to say what classification he
4 is in and whom, if anyone, is similarly situated in a different
5 classification that has not been prosecuted. That the case is
6 interesting or high profile, is insufficient to constitute some
7 evidence of selective prosecution.

8 I refer you to the transcript of proceedings held this
9 morning and also to *United States v. Alameh*, the case I cited
10 before A-l-a-m-e-h, at 341 F.3d 167, a Second Circuit case from
11 2003; also, *United States v. Fares*, F-a-r-e-s, 978 F.2d 52, a
12 Second Circuit case from 1992. I also refer you to *United*
13 *States v. Manuel*, 64 Fed. Appx. 823, a Second Circuit case from
14 2003; and *United States v. Thompson*. The 2013 Westlaw cite is
15 624, 64, 89, a Southern District case from that year, 2013.

16 And, finally, *United States v. Hunter*, 13 F.Supp.2d
17 586, a case from Vermont, where the Court stated the
18 following: "Permitting discovery of the reasons for criminal
19 prosecution is an extraordinary step delaying the criminal
20 proceeding and compromising the government's ability to
21 prosecute effectively."

22 So that resolves the motions. There are some motions
23 in limine. Before I turn to them, I just want to make sure
24 that I am on the same page as the government and the defense
25 here as to what motions are still open. So my understanding is

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1 that there's still the government's motion to preclude
2 Mr. D'Souza from arguing motives for his conduct; is that
3 right, that motion is still on the table, as it were?

4 MS. COHEN: Yes, your Honor.

5 THE COURT: Okay. And then there's the government's
6 motion to preclude the defendant from arguing the government's
7 alleged motives in charging the defendant. That has been
8 resolved on consent, I believe?

9 MR. BRAFMAN: That's correct, your Honor.

10 THE COURT: Then there is the government's motion --
11 Well, is there the government's motion for permission to
12 authorize 404(b) evidence, the fact -- or as alleged by the
13 government, that D'Souza violated Federal Campaign Finance laws
14 in connection with his own contribution -- that is to say, the
15 \$10,000 contribution to Wendy Long made in February of 2012 --
16 is that still on the table?

17 MS. COHEN: Your Honor, I think the government stated
18 this morning, at this point, I don't think the Court needs to
19 decide it. It is likely that will not be an issue during this
20 trial. If that changes during this trial, we will advise the
21 Court in advance of any such testimony being presented.

22 THE COURT: Okay. And then the only other motion that
23 I'm aware of was the motion for permission to introduce
24 portions of an audio recording of an anticipated witness at
25 that time, Dr. Louis Joseph, made of an October 30, 2013,

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1 conversation with his wife, Denise Joseph. I understand that
2 that is also withdrawn; is that right?

3 MS. COHEN: That's correct. The government and
4 defense have set forth in the government's letter to the Court,
5 they have agreed that neither party will seek to introduce the
6 tape or refer to its existence or the fact that the tape was
7 made.

8 MR. BRAFMAN: And even though this is not in the
9 letter, there was a follow-up discussion, I think we're also in
10 agreement that should the defendant testify, he will not be
11 cross-examined about anything that is on that tape.

12 MS. COHEN: That is correct, your Honor.

13 MR. BRAFMAN: Thank you.

14 THE COURT: Let's then turn to the one motion that is
15 still ripe, so to speak, for resolution, which is the
16 government's motion in limine dated April 17, 2014. The
17 defense response to that motion is dated April 23, 2014.

18 So the government's motion to preclude the defendant
19 from arguing, suggesting or offering motives for his conduct is
20 respectfully denied. It's appropriate, in the Court's view, to
21 give the defendant in a criminal case leeway to assert a
22 defense.

23 At the same time, you are all aware, I put you on
24 notice, that issues concerning the legal significance, if any,
25 of a defendant's reasons for his conduct can and will be

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1 resolved in the jury instructions, which we have not gotten to.
2 But I do give you all a heads up that usually there is an
3 instruction in criminal cases that if the guilt of the
4 defendant is shown beyond a reasonable doubt, it is immaterial
5 what defendant's motive for the crime may be or whether the
6 defendant's motive was shown at all. So there's a fuller
7 instruction, which I think you're all familiar with, but I just
8 mention that in resolving that motion.

9 So there's one other piece of business that I want to
10 cover that I think will help you prepare for the trial on
11 Tuesday, and that is there's been considerable back and forth
12 on the issue of "willfully." And the government arguing for, I
13 don't want to call it a more traditional definition. It's a
14 definition that's been commonly used and has been used by me,
15 as well, of "willfully," and the defense arguing for a more,
16 let's say rigorous standard, a more precise definition.

17 So I do intend to use this charge for "willfully" and
18 that would be: "An act is done willfully if it is done with an
19 intention to do something the law forbids or with a bad purpose
20 to disobey the law or with a specific intent to fail to do
21 something the law requires to be done. The defendant need not
22 have known that he was breaking any particular law or any
23 particular rule. He need only have been aware of the generally
24 unlawful nature of his actions.

25 "Accordingly, it is not necessary for the government

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1 to prove that the defendant was aware of the specific provision
2 of the law that he is charged with violating. Rather, it is
3 sufficient for the defendant to act knowing that his conduct is
4 unlawful, even if he does not know precisely which law makes it
5 so."

6 And in support of that definition, I'm relying upon,
7 among others, these cases, several, if not all, of which the
8 defense contends -- and that objection is noted in the
9 record -- are called into question. The cases are *United*
10 *States v. Whab*, 355 F.3d 155, Second Circuit case from 2004,
11 authored by Judge Cabranes. Another case is *United States v.*
12 *George*, 386 F.3d 382, a Second Circuit case from 2004 authored
13 by Judge Sotomayor, and another -- and I'm sure there are
14 others in addition to these, but these are the citations --
15 *United States v. Carrasquillo*, 239 Fed.Appx. 634, Second
16 Circuit case from 2007.

17 Another case that you may find instructive is *United*
18 *States v. Braddock*, the Westlaw cite is 2003 Westlaw 441, 1531,
19 District of Connecticut case from 2013.

20 So that's all I have for you today, unless you have
21 any questions for me with respect to the trial which starts
22 Tuesday morning.

23 MS. COHEN: Sure, your Honor. Just before I get to --
24 We have, I think, just two issues to address for the trial, one
25 question and one issue I wanted to put on the record.

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1 But just with respect to your Honor's ruling regarding
2 1001, the second count, I believe your Honor, in reciting your
3 Honor's decision to deny the motion, said that the Josephs'
4 form was submitted to the campaign. That form was actually
5 sent to the Josephs but was never completed by them and sent
6 back. I don't think that that changes your Honor's decision in
7 any way, and the checks at issue were made out under -- by the
8 Vawsers and the Josephs and submitted to the campaign in their
9 name; so I don't think it changes your analysis.

10 THE COURT: I stand corrected, but I think you're
11 right, the analysis is the same.

12 MS. COHEN: And the *U.S. v Pan* case was in front of
13 Judge Sullivan, not Judge Sweet. I believe they have the same
14 initials.

15 THE COURT: You're absolutely right.

16 MS. COHEN: Just with respect to the trial, just a
17 procedural issue. I don't know -- we're starting on Tuesday,
18 and we wanted to know if the Court, if the trial goes that
19 long, would be sitting on Friday.

20 THE COURT: Yes.

21 MS. COHEN: Just noting that's the Friday before
22 Memorial Day.

23 THE COURT: Yes.

24 MS. COHEN: Thank you, your Honor.

25 THE COURT: What I typically do on a Friday is have a

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1 shortened day, perhaps start a little earlier but perhaps not.
2 But in any event, let people go by 1:00, 1:30, something like
3 that.

4 MS. COHEN: Thank you, your Honor. And the other
5 thing I wanted to put on the record is that there has been no
6 plea offer in this case. The government had previously sent a
7 Pimentel to the defense. I have been informed by the defense
8 that he has had discussions with his client and his client does
9 not wish to plead to the indictment at this time.

10 MR. BRAFMAN: Your Honor, when you are impaneling the
11 jury, may I assume that the Court will use the struck method?

12 THE COURT: Yes.

13 MR. BRAFMAN: May I ask one other question? Simply so
14 we do not lose prospective jurors who may have plans for the
15 Memorial Day weekend, could you tell them -- I think we both
16 pretty much estimate that the length of the trial is not going
17 to be very long, and that's, obviously, dependent on when we
18 begin. But it's inconceivable to me that it's actually more
19 than two full days of testimony; so....

20 THE COURT: So I will also probably discuss that that
21 weekend is impending, and we all think we'll be done by then,
22 but I guess they should bear that in mind, in the meantime.

23 MR. BRAFMAN: And for jurors who have plans for the
24 holiday, we would not be sitting on the 30th, I'm sorry, on
25 Monday?

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1 THE COURT: No.

2 MR. BRAFMAN: So if the deliberations continue, they
3 would be able to continue their plans?

4 THE COURT: They would come back Tuesday.

5 MR. BRAFMAN: Thank you very much.

6 THE COURT: The next week instead.

7 MR. BRAFMAN: Thank you.

8 MS. COHEN: Your Honor, there were several issues that
9 the defense raised with respect to voir dire, and I didn't know
10 if your Honor wanted to address those now. Specifically, are
11 you --

12 MR. BRAFMAN: I can capsulate.

13 MS. COHEN: It's the defense's argument, maybe the
14 defense can mention --

15 MR. BRAFMAN: Your Honor, we submitted a request
16 pursuant to rule 24, suggested questions that we asked the
17 Court to consider including among the general questions, and I
18 didn't note an objection from the government. Indeed, I
19 thought it was considered a joint submission.

20 But as a practical matter, the defendant is well known
21 among some circles. There's been a lot of publicity about him
22 in the past, books that he's written and speeches he's given,
23 there are many members of the media in the courtroom, and the
24 real questions were, do they know the defendant, have they read
25 anything that he has authored, and to the extent that they have

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1 a political bias that would prevent them from being fair. I
2 think it's an appropriate inquiry for The court to make, given
3 the tension that exists between this defendant and the current
4 administration.

5 THE COURT: I think we will elicit that, and if at the
6 time you feel we haven't, just slip me a note or something, but
7 I think we'll cover that. I think it's a fair point.

8 MR. BRAFMAN: Thank you, your Honor.

9 MR. KRIEGER: Your Honor, the government doesn't
10 object to that voir dire of the jury. It's the middle
11 suggestion by the defendant in his submission of April 23rd.
12 We do have issues with two other requests that were made.

13 THE COURT: Well, you know, what I normally do is I
14 sort of take it all under submission, and then use my best
15 judgment. I usually don't get into big debates in advance
16 about these kinds of questions.

17 MR. KRIEGER: That's fine, your Honor. We just wanted
18 to note our objection to that.

19 THE COURT: Yes, fair enough. For the voir dire, I
20 was hoping you could provide me with a little more detail.
21 There's an entity called Compliance Consulting. Did I get that
22 right?

23 MS. COHEN: You did, your Honor.

24 THE COURT: So is that an entity in New York or in
25 some other venue? So that the jury might have a sense of if

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1 they know about it or what it is.

2 MS. COHEN: Sure. It's an entity that is in Virginia.
3 Although, it also has employees or consultants who work in
4 Florida, but it is primarily based in Virginia. It is the
5 entity that Wendy Long hired to do the necessary campaign
6 filings and to --

7 THE COURT: So it is essentially as described by its
8 title, Compliance Consulting. If I said of Virginia, do you
9 think that would be adequate?

10 MS. COHEN: That is adequate, your Honor. I would
11 just also add --

12 THE COURT: Mr. Brafman, would that be okay?

13 MR. BRAFMAN: Yes, your Honor.

14 THE COURT: And then there was a mention of -- I must
15 confess my ignorance -- the Henry Ford Hospital is located
16 where?

17 MR. KRIEGER: It's in Detroit.

18 THE COURT: Okay. I think I was able to identify --

19 MS. COHEN: I think there's an additional sort of
20 names of places, if you could just add the law firm Kirkland
21 and Ellis. Wendy Long, for part of her career, was an
22 associate and a partner there; so it may come up in her
23 background, in her expected testimony.

24 THE COURT: Okay. So we usually do a pretty quick
25 trial. We try to keep the jurors engaged, so to speak. As a

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1 practical matter, probably on Tuesday we won't get to voir dire
2 before 10:30. Even though we want to start at 9:30 it's
3 probably not likely. Could get them at 10:00, but just so you
4 know.

5 And I try not to have many sidebars. We try to move
6 things along as expeditiously as we can. So Tuesday,
7 Wednesday, Thursday, I'm prepared to, as I said before, be here
8 on Friday. It depends on how things go. You are the best
9 judges of that, but I will, as I said before, have that
10 discussion just to keep it in everybody's mind that Memorial
11 Day is approaching. So that's it. It's nice to see you all.
12 See you on Tuesday.

13 MR. BRAFMAN: Thank you, your Honor.

14 MS. COHEN: Thank you, your Honor.

15 THE COURT: You bet. Counsel, Christine mentioned
16 that she has mentioned to you if you wish to come by Monday
17 afternoon to try out any of the acoustics or equipment or
18 arrangements, you're certainly welcome and free to do that.

19 MS. COHEN: Yes, thank you. We'll arrange that.

20 MR. BRAFMAN: Thank you, Judge.

21 THE COURT: You can call chambers anytime, yes.

22 MS. COHEN: Thank you, your Honor.

23 THE COURT: Thanks again.

24 (Adjourned)